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PROMOTION, PROTECTION AND RESTORATION OF HUMAN RIGHTS AT NATIONAL, REGIONAL AND INTERNATIONAL LEVELS:

PREVENTION OF DISCRIMINATION AND PROTECTION OF CHILDREN: HUMAN RIGHTS AND YOUTH

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication, which is distributed in accordance with Economic and Social Council resolution 1296 (XLIV).

[29 July 1994]

Some brief suggestions designed to secure more effective implementation of the United Nations Convention on the Rights of the Child adopted on 20 November 1989

1. The United Nations Convention on the Rights of the Child (hereinafter referred to as the CRC) was adopted on 20 November 1989 and came into force on 2 September 1990. The American Association of Jurists considers that the procedure for supervision of the implementation of the CRC could be further improved.

2. The need for improvement is becoming increasingly urgent, mainly for two reasons. The first relates to the particularly grave and repellent character of certain violations of the rights of the child. In these circumstances the international community has a duty to establish standards and procedures, designed effectively to eradicate such violations, and supervisory machinery of a nature to ensure that the rights of the child are respected in all circumstances. The second relates to the decision of the Commission on Human Rights to set up a working group to study a possible draft of an optional protocol to the Convention on the Rights of the Child concerning the sale of children, child prostitution and child pornography (resolution 1994/90, paragraph 17); the draft optional protocol concerning the elimination of sexual exploitation and trafficking in children, prepared by the national institutions for the promotion and protection of human rights (E.CN.4/1994/45/Add.1), and the draft concerning the increase in the minimum age for the induction of children into the armed forces, prepared by the Committee on the Rights of the Child. An optional protocol is needed which will cover at least the aspects mentioned in these drafts and recognizing that sexual exploitation and trafficking in children are crimes against humanity and should be subject to the principle of international criminal jurisdiction. However, a protocol of this kind, and some of the prerogatives enshrined in the CRC, might remain mere declarations of intent without the establishment of systems of verification, supervision and investigation and forceful and effective procedures for the denunciation of violations of the rights of the child.

3. Currently the Committee on the Rights of the Child is responsible (see CRC, article 43) for examining the reports which States Parties are required to submit on the measures taken to give effect to the rights recognized in the Convention and the progress made in the enjoyment of those rights (CRC, article 44). The procedure is complex and, above all, laborious. The reports submitted by States are often incomplete or late. In our view this procedure should remain transitional in nature, enabling States to familiarize themselves with the different requirements of the Convention so as to be able to accept at a later date forms of supervision which, while stricter, would be more effective from the standpoint of the promotion of the rights guaranteed. However, the CRC does not provide for any other machinery for verification. The American Association of Jurists considers the time ripe for the study of other supervisory procedures of a nature to ensure optimum achievement of the rights guaranteed by the CRC. We have considered a number of solutions, including those described in the paragraphs which follow.

Adoption of an optional protocol to the CRC establishing a procedure for the submission of complaints

4. It is proposed to establish a purely optional right of individual complaint in the form of an optional protocol to the Convention. One of the obstacles to the institution of such a procedure lies in the heterogeneous nature of the rights guaranteed by the CRC, which covers not only civil and political rights but also economic, social and cultural rights. At present a procedure for the submission of complaints exists in respect of rights in the first group only. Thinking on the subject has advanced sufficiently to permit contemplation of the establishment of a complaints procedure covering failure to respect economic, social and cultural rights (see the working paper E/C.12/1992/WP.9 by M. Alston entitled "Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights"). Thus the heterogeneity of the rights guaranteed by the CRC is no longer an obstacle to the adoption of an optional protocol providing for an individual right of complaint.

5. The complaints procedure might be constituted as follows:

(a) The Committee on the Rights of the Child would be recognized as competent to examine observations from individuals relating to failure by a State Party to respect any of the rights protected by the Convention.

(b) Any person within the territory of a State Party would be able to submit a petition, provided that he or she has a personal interest in so doing, either as a victim or as the representative of a victim. Since the victims of violations of the rights guaranteed must of necessity be children, a good deal of flexibility would be needed in interpreting the concept of "representative of the victim". One might even envisage recourse to actio popularis along the lines laid down in the Inter-American Convention on Human Rights. The very existence of legislation running counter to the CRC should be considered as constituting a violation of one of the rights guaranteed even where no case of its concrete application exists. The mere adoption of legislative measures, without any effective implementation subsequently, would not be considered as full discharge by States Parties of their obligations.

(c) A complaint might be lodged in respect of any of the rights guaranteed by the CRC.

(d) When an individual complaint is made, States in which economic development makes the implementation of certain economic, social and cultural rights more difficult than elsewhere would be held responsible for not having ensured the enjoyment of the "minimum core" of those rights. They would, however, have to demonstrate that every effort has been made to use all resources that are at their disposition in an effort to satisfy, as a matter of priority, those obligations (Committee on Economic, Social and Cultural Rights, General Comments, No. 3, 1990, paragraph 10).

The adoption of an optional protocol to the CRC providing for an advisory opinion procedure

6. It is recognized that as a general rule advisory opinions are given exclusively by courts of law. However, there is nothing to prevent a committee of experts, such as the Committee on the Rights of the Child, from acting similarly. All that is needed is a clear definition of the material field of

advisory competence. It should be limited to the interpretation of the rights guaranteed by the Convention.

7. In such conditions States Parties could consult the Committee to obtain precise information on domestic legislation which might run counter to the principles laid down in the CRC. The same States might also seek the views of the Committee on the compatibility of draft legislation with the Convention.

8. In addition, the Committee, taking as an example the wide interpretation which the Inter-American Court of Human Rights attaches to its advisory functions, might decide that "there is nothing contrary to the exercise of its advisory function in the fact that the subject on which its opinion is requested relates to a concrete case" (Inter-American Court of Human Rights, advisory opinion OC-3/83 of 8 September 1983, Series A, No. 3, paragraph 45). As their name suggests, the advisory opinions expressed by the Committee are not legally binding. However, an advisory opinion offers the advantage of a more precise analysis of the situation and a more well-founded final opinion.

Development and improvement of examination of reports

9. One might, for instance, envisage the appointment of a "special" expert for each State Party. The principal task of such an expert would be to study the reports from the State for which he is responsible. These experts would be required to communicate their findings to the members of the Committee. The procedure for the examination of reports would thus be speeded up and made more precise.

10. Taking as a model the General Comments adopted by the Human Rights Committee, the Committee on the Rights of the Child might in this manner interpret the scope of the obligations and the rights laid down in the CRC. Such interpretations would form integral parts of the Convention and would enable States parties to ascertain the extent of their commitment without risk of misunderstanding. According to paragraph 2(c) of Recommendation 3 of the Committee on the Rights of the Child (CRC/C/19/Rev.1), a procedure of this kind has already been envisaged.

11. However, it must not be forgotten that a right of recourse against violations of civil and political rights already exists - that of individual appeal to the Human Rights Committee. Any person (including a child) in the territory of a signatory State enjoys the rights guaranteed by the International Covenant on Civil and Political Rights and may submit an individual communication to the Committee. When considering the cases of children who have been victims of violations of the rights guaranteed by the Covenant, it would be desirable for the Human Rights Committee to refer to the CRC when analysing the substance of the complaint. A broad interpretation of article 46 of the Covenant could confer on it the necessary powers.